IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL

[Court's order whether the case is approved for reporting or not under Chapter VIII Rule 32 (2) (b)]

Description of the case

Writ Petition No. 961 (SS) of 2001

Shekhar Chand

Joshi. **.....Petitioner**

Versus

Commandant, IRLA No. 21793, BSF

and others. **.....Respondents**

Approved for reporting

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Not approved for reporting

Date of Decision: April 23, 2007

Initial of Judge

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IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL

Writ Petition No. 961 (S/S) of 2001

Shekhar Chand Joshi aged 51 years,
S/o Late Chet Ram Joshi, Caste Brahmin, Calling Agriculture
R/o Village & Post Pantgaon, Patti Talla kaklasaun, Tehsil
Bhikiasen, District Almora ------- Petitioner

Versus

1. Commandant IRLA No. 21793, 52 Bn. B.S.F. (PO) SSFC 3110200 PM, Talliguri District Cooch Bihar (W.B.)
2. Deputy Commandant (Recording Officer) 52 Bn., B.S.F. Talliguri, District Cooch Bihar (W.B.)
3. Assistant Commandant, 52 Bn., B.S.F. Talliguri, District Cooch Bihar (W.B.)
4. Sub-Inspector 52 Bn. B.S.F. Talliguri, District Cooch Bihar (W.B.)
5. Union of India through Secretary of Home Affairs Government of India, North Block, New Delhi
6. Director General B.S.F., 10, C.G.O. Complex, Lodi Raod, New Delhi

--------Respondents

Hon'ble M.M. Ghildiyal, J.

Heard Sri B.D. Upadhyay, learned counsel for the petitioner and Smt. Anjali Bhargav, learned counsel Union of India for the respondents.

By means of this writ petition, the petitioner has prayed for the following relief:

a. Issue a writ, order or direction in the nature of certiorari or any other suitable writ, order or direction calling for the record from Summary Security Force Court form the office of IRLA Commandant, 52 Bn. B.S.F. Talliguri (W.B.) No. Estt/SSFC/SCJ/52 Bn/2000/13358-62 dated 31st Oct., 2000, quashing/setting aside the impugned order and judgment

passed by Sri H.K. Soni, Commandant 52 Bn., B.S.F. Against the petitioner dismissing him from service (Annexure No. 18).

b. Issue a writ, order or direction in the nature of mandamus commanding the respondents no. 1 to 6 to reinstate the petitioner in service w.e.f. 31.10.2000 and to pay him his arrears of service pay, bonus, gratuity, group insurance, funds and all other service and pensionary/ family pensionary benefits to the petitioner.

c. Issue a writ, order or direction in the nature of mandamus commanding the respondents no. 1 to 6 restrain them from withholding the arrears of service pay, funds, bonus, gratuity, group insurance and all other service and pensionary benefits to the petitioner.

d. Issue a writ, order or direction of which this Hon'ble Court may deem fit and proper under the circumstances of the case in favour of the petitioners.

e. Award the costs of the petition to the petitioner.

f. To issue a writ, order or direction in the nature of certiorari to call for the record of the case and quash the order dated 15.062001 passed by the respondent no. 6 and reinstate the petitioner in service with all consequential benefits.

g. To issue a writ, order or direction in the nature of mandamus directing the respondents to decide the representation dated 16.06.2003 in accordance with law within time as granted by this Hon'ble Court.

The amendment application was moved by the petitioner to add prayer nos. 'f' and 'g'. This application was allowed on 28.10.2004.

The facts of the case are that the petitioner was serving as Head Constable in the Bn. 52 of Battalion Security Force. While he was posted at Bangladesh Border, for an incident, which occurred on 10.09.2000, 6 persons, namely, Sri Keshwa Nand, Sri Virpal Singh, Sri Binen Mochahari, Sri Salesh Kumar, Sri Balbir Singh and the petitioner were charge-sheeted and were punished for the offences under Section 40 of the Border Security Force Act.

Vide order dated 31st October, 2000, Sri Keshwa Nand, Sri Virpal Singh and Salesh Kumar were retained in service while the petitioner, Sri Binen Mhahari and Sri Balbir Singh were dismissed from service.

Binen Mochahari and petitioner filed statutory appeal against the order of dismissal which was rejected by the appellate authority. The appeal of Binen Mohahari was dismissed on 10th September, 2000, whereas in respect of the petitioner, the appellate authority modified the dismissal order and converted it into compulsory retirement with 2/3 pension vide order dated 15th June, 2001. Binen Mochahari filed writ petition before the Guwahati High Court and the Guwahati High Court on 13.11.2002 quashed the dismissal order and has further held that the petitioner, that is, Binen Mochahari shall be reinstated in service with all service benefits.

The facts giving rise to the instance on 10th September, 2000 are that the Head Constable was informed at about 10.30 p.m. regarding infiltration of some Bangladeshi National and the petitioner, who was the Commander of the Patrolling party, ordered the ambush point No. 3 to search the house and to nap the criminals. Constable Salesh Kumar found an infiltrator and

while he was trying to apprehend him, the said infiltrator assaulted Salesh Kumar. In order to save Salesh Kumar, Constable Binen Mochahari fired one round from his servie rifle, which ultimately hit the Constable Salesh Kumar and the infiltrator left the seen and fled away.

For this incident, charge sheet was issued against the petitioner, Sri Keshwa Nand and Sri Virpal Singh with following charges.

CHARGE AGAINST NO. 68104305 HC S.C. JOSHI
FIRST CHARGE
BSF ACT-1968, SECTION – 40
AN ACT PREJUDICIAL TO GOOD ORDER AND DISCIPLINE OF THE FORCE

In that he,

at about 2300 hrs on 10 Sept 2000 at BOP Digaltari, while carrying out patrolling as patrolling Comdr in area ambush point No. 3, No. 94154586 Constable Binen Mochahari one of the member of ambush party rashly and negligently fired one round from his service rifle and caused grevious hurt to No. 93154135 Constable Salesh Kumar 52 Bn BSF in his presence and knowledge, intentionally failed to report the facts to the Coy Comdr and improperly tried toe hide and hush up the facts and told fabricated version of incident.

SECOND CHARGE
BSF ACT –1968, SECTION – 40
AN ACT PREJUDICIAL TO GOOD ORDER AND DESCIPLINE OF THE FORCE

In that he,

at about 0630 hrs. on 11 Sept 2000 at BOP Digaltari, un-authorisely assisted No. 94154586 Constable Binen Mochahari in replacing fired round with live round of 7.62 BDR and intentionally did not report to the Coy Comdr.

CHARGE AGEINST NO. 90199093 CONST. KESHWA NAND
BSF ACT –1968, SECTION – 40

AN ACT PREJUDICIAL TO GOOD ORDER ABND DISCRIPLINE OF THE FORCE

In that he,

at about 2300 hrs on 10 Sept 2000 at BOP Digaltari, while carrying out patrolling as patrolling Comdr in area ambush point No. 3, No. 94154586 Constable Binen Mochahari one of the member of ambush party rashly and negligently fired one round from his service rifle and caused grevious hurt to No. 93154135 Constable Salesh Kumar 52 Bn BSF in his presence and knowledge, intentionally failed to report the facts to the Coy Comdr and improperly tried toe hide and hush up the facts and told fabricated version of incident.

CHARGE AGEINST NO. 90199090 CONST.VIRPAL SINGH
BSF ACT –1968, SECTION – 40
AN ACT PREJUDICIAL TO GOOD ORDER ABND DISCRIPLINE OF THE FORCE

In that he,

at about 2300 hrs on 10 Sept 2000 at BOP Digaltari, while carrying out patrolling as patrolling Comdr in area ambush point No. 3, No. 94154586 Constable Binen Mochahari one of the member of ambush party rashly and negligently fired one round from his service rifle and caused grevious hurt to No. 93154135 Constable Salesh Kumar 52 Bn BSF in his presence and knowledge, intentionally failed to report the facts to the Coy Comdr and improperly tried toe hide and hush up the facts and told fabricated version of incident.

After the Summary Security Force Court proceedings were over, the Commandant passed order on 31st October, 2000 dismissing the petitioner from service along with Binen Mochahari and Balbir Singh. The petitioner preferred appeal before the appellate authority and the appellate authority modified the order of dismissal by passing order of compulsory retirement.

The respondents have filed counter affidavit and the facts stated by the petitioner in the writ petition have been admitted by

the respondents in the counter affidavit. Almost similar charges were levelled against all the three persons including petitioner.

Learned counsel for the petitioner has challenged the impugned orders dated 31.10.2000 passed by Commandant and 15.06.2001 passed by Director General of Border Security Force mainly on two grounds. First, the order of dismissal is a non speaking order. The order 31.10.2000 is quoted hereunder:-

:ORDER:

"No. 68104305 Head Constable S.C. Joshi of this unit was tried by Summary Security Force Court on 31st Oct,/ 2000 at 17.30 Hrs to 2000 Hrs for the offences committed under Section 40 on 10 & 11 Sep, 2000.

No 68104305 Head Constable S.C. Joshi found guilty of the charge and awarded punishment, Dismissed from service."

From perusal of this order, it is clear that the Commandant has not recorded any reason nor he has discussed the charge levelled against the petitioner and reply, if any, filed by the petitioner.

The second on which the petitioner has attacked these orders dated 30.10.2000 and 15.06.2001 is that while the patrolling party of Bangladesh Border was patrolling to check the infiltration, someone tried to assault Constable Salesh Kumar and in order to save the life of Salesh Kumar, Constable Binen Mochahari fired one round from this service rifle, which unfortunately hit the thigh of Salesh Kumar, causing injury.

By no stretch of imagination, the act of Binen Mochahari can be levelled as negligent or rash. On the contrary, it was Constable Binen Mochahari, who tried to save the life of his colleague. In the

statement, Sri Salesh has categorically stated that had Sri Binen Mochahari not fired, he could have been severely assaulted or killed be the infiltrator. Though the person, who has fired on Salesh Kumar, that is, Binen Mochahari, has been reinstated by the Guwahati High Court holding that by no stretch of imagination, the act of Binen Mochahari can be levelled as negligent or rash to better human life and on the contrary it was Binen Mochahari, who tried to save life of the colleague.

The petitioner, who has neither fired nor was responsible for that incident, was dismissed by the Commandant which order was ultimately modified by the appellate authority into a compulsory retirement. The information about the said incident was sent to the higher authorities by the petitioner. The only charge against the petitioner is that he informed the higher authorities about the incident later on.

The fact has not been denied in the counter affidavit and further this was not the charge levelled against the petitioner in the charge sheet, which is clear from the charge sheet.

For the reasons recorded above, the order dated 31st October, 2000 passed by Commandant 52 Bn. B.S.F. and order dated 15.06.2001 passed by the appellate authority are quashed. The petitioner shall be reinstated in service with all service benefits.

Since the petitioner was dismissed from service w.e.f. 31st October, 2000 and he is getting 2/3 pension, it would be in the interest of justice to award 50% of the salary to the petitioner from the date of dismissal till the date of reinstatement that shall be

paid by the respondent after adjusting the amount of 2/3 pension already paid to the petitioner.

The writ petition is allowed. No order as to costs.

(M.M. Ghildiyal, J.)

23.04.2007
VKS